Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1978

No. 77-1434

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Petitioner,

v.

JAMES T. GRIFFITH,
Respondent.

On Petition for Writ of Certiorari
To the Missouri Court of Appeals, St. Louis District

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Missouri Court of Appeals, St. Louis District, (App. A of Petition) affirming the judgment for the Respondent is reported as *James T. Griffith v. St. Louis-San Francisco Railway Company*, 559 S.W.2d 278 (Mo.App. 1977). The order of the Missouri Court of Appeals, St. Louis District, denying Petitioner's motion for rehearing or transfer to the Mis-

souri Supreme Court (App. C of Petition) and the order of the Missouri Supreme Court denying Petitioner's application for transfer to that Court (App. B of Petition) are not reported officially but are noted briefly with the opinion of the Missouri Court of Appeals. 559 S.W. 2d at 278.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under *28 U.S.C. § 1257 (3)*. Respondent specifically denies that jurisdiction is conferred on this Court under *28 U.S.C. § 1257 (3)*. The federal question Petitioner seeks to present herein is not a substantial one and was not presented to or decided by the state courts herein.

QUESTION PRESENTED

Whether *Missouri Supreme Court Rule 70.02, V.A.M.R.*, mandates the use of one and the same designated jury instruction (M.A.I. 24.01) for all Federal Employers' Liability Act cases tried in the state courts of Missouri, regardless of its applicability, and whether, as such, it is in conflict with the Federal Employers' Liability Act. Contrary to Petitioner's assertion in its formulation of the Question Presented, *Missouri Supreme Court Rule 70.02, V.A.M.R.*, requires utilization of a Missouri Approved Instruction (M.A.I.) *only* if it is "*applicable in a particular case.*"

STATEMENT OF THE CASE

Petitioner's statement of the case does not constitute a fair and concise statement of the facts relevant to the issues herein. In order to avoid repetition, additional relevant facts will be set forth under the appropriate point in the Argument.

ARGUMENT

I

The Writ Should Be Denied Because This Court Has No Jurisdiction to Decide the Question Presented by the Petition for a Writ of Certiorari in That the Question Was Not Properly Presented to, or Passed on by, the State Courts Below.

The Petitioner seeks to invoke the jurisdiction of this Court under *28 U.S.C. § 1257 (3)*. On its face, § 1257 (3) requires that the federal right in question be "specially set up or claimed" in the state proceedings. This Court has no jurisdiction of a case in which the sole federal question presented has "never been raised, preserved or passed upon in the state courts below." *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162, 22 L.Ed.2d 398 (1969).

Stated differently, to sustain this Court's jurisdiction under § 1257 (3), the question presented by the Petition for Writ of Certiorari must have been presented to the state courts in such a way that it was necessarily passed on by the state appellate courts in affirming the judgment below. *Street v. New York*, 394 U.S. 576, 581-582, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572 (1969). *See also Bailey v. Anderson*, 326 U.S. 203, 66 S.Ct. 66. 90 L.Ed. 3 (1945) (same principle on direct appeal).

The prevailing test as to whether a federal question was sufficiently presented in the state courts to confer jurisdiction on this Court to review that question was stated by this Court in *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 49 S.Ct. 61. 73 L.Ed. 184 (1928). *Zimmerman* held a federal question must be raised "with fair precision and in due time" in the state courts in order to be reviewed in this Court.

In applying this test, two considerations should be kept in mind. First, in order to present the federal question with "fair precision", the party presenting the question must at least make it clear that *federal*, rather than state law is being relied on. *See, e.g., Bailey v. Anderson*, 326 U.S. 203, 206, 66 S.Ct. 66, 68, 90 L.Ed. 3 (1945); *New York Central & H.R.R. Co. v. New York*, 186 U.S. 269, 22 S.Ct. 916, 46 L.Ed. 1158 (1902).

Secondly, whether the federal question was raised in "due time" is a question normally determined by state procedural rules. *See, e.g., Beck v. Washington*, 369 U.S. 541, 549-554, 82 S.Ct. 955, 960-962, 8 L.Ed.2d 98 (1962). Thus, a refusal by a state court to consider a federal claim due to a failure to raise it in accordance with state procedural rules constitutes an independent and adequate state procedural ground for decision which will preclude review by this Court so long as the procedural rule serves a legitimate state interest and is not applied in an improper attempt to prevent implementation of federal rights. *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965).

The question presented by the Petition for Writ of Certiorari filed in this case is whether *Missouri Supreme Court Rule 70.02, V.A.M.R.*, mandates the use of only one and the same designated jury instruction (M.A.I. 24.01) for all Federal Employers' Liability Act cases tried in the state courts of Missouri, regardless of its applicability to a given case, and whether, as Petitioner contends, that as such, it is in conflict with the Federal Employers' Liability Act. While it is clear that Petitioner's contention is contrary to the express provisions of *Missouri Supreme Court Rule 70.02, V.A.M.R.*, and the Missouri decisions thereon, as is more fully set forth in Part II of this brief, it is also clear that the question raised by the Petition for Writ of Certiorari has been raised for the first time in this Court. An examination of the record in this case makes it evident that the issue was not raised with fair precision or in due time in the Missouri courts.

The only issues raised by Petitioner in the trial court with respect to Respondent's verdict directing instruction, which followed M.A.I. 24.01, were set forth in paragraph 11 of its Motion for New Trial, which stated in part as follows (R.370-371):

> "11. The Court erred in giving Instruction No. 2, plaintiff's verdict director, in that said instruction is a roving commission to the jury permitting the jury to find defendant negligent for 'failing to provide reasonably safe conditions for work' without specifying what conditions were at issue. Further, said instruction permits the jury to disbelieve plaintiff's personal testimony and the testimony of his witness as to the condition of the reassembly rack and as to whether defendant had knowledge of that condition as claimed by plaintiff, and did find for plaintiff because defendant made changes in the rack after the accident in an attempt to avoid such accidents in the future which argument was made by plaintiff's counsel."

It is evident that these contentions address themselves solely to issues of state law. They do not even contain a reference to federal law.

Under Missouri law, Petitioner was required to set forth any issue it wished to raise with respect to Respondent's verdict directing instruction in its Motion for New Trial in order to preserve the issue for appellate review. *Missouri Supreme Court Rules 70.03 (then Rule 70.02), 78.07, 84.13 (a), V.A.M.R.* This requirement is consistently adhered to by the Missouri Courts. *See, e.g., Bower v. Hog Builders, Inc.*, 461 S.W.2d 784, 797 (Mo. 1970); *Vinyard v. Vinyard Funeral Home, Inc.*, 435 S.W.2d 392, 395-396 (Mo.App. 1968). This rule is also supported by a clearly legitimate state interest. That interest is in giving the trial court a "last opportunity to correct his [instructional] errors without the delay, expense or hardships of an appeal." *Skelton v. General Candy Co.*, 539 S.W.2d 605, 610 (Mo.App. 1976). Petitioner totally failed to present the

federal issue it seeks to raise in this Court to the trial court either at trial or in its motion for new trial, and thereby failed to preserve the issue for review by the Missouri appellate courts.

Petitioner's failure to present the federal question raised in this Court to the Missouri courts with "fair precision" was repeated in the Missouri Court of Appeals. Petitioner's contentions on appeal were based on the same state law grounds set forth in his Motion for New Trial.

The opinion by the Missouri Court of Appeals demonstrates that it did not decide any question of federal law in ruling on Petitioner's contentions with respect to Respondent's verdict directing instruction. That being the case, it may be properly assumed that no federal question was properly raised, preserved and presented to it. *Street v. New York*, 394 U.S. 576, 581-582, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572 (1969).

This conclusion is underscored by Petitioner's failure to comply with *U. S. Supreme Court Rule 23 (f)*, which requires the statement of the case in the Petition for Writ of Certiorari to specify the precise time and manner of the raising of the federal question in the state court of first instance and the state appellate courts, along with the manner in which the state court passed on the question. A review of Petitioner's statement of the case reveals a manifest failure to comply with the Rule. The reason is simply that Petitioner cannot comply when, as demonstrated above, the federal question presented herein was never raised and preserved in the state courts.

Petitioner utterly failed to present a federal question with fair precision, in due time and in accordance with Missouri procedure in the state courts. The question presented by Petitioner in this Court was not passed on by the state courts. No federal claim was specially set up or claimed by Petitioner. Consequently, this Court has no jurisdiction of the question presented under *28 U.S.C. § 1257 (3)*. *Tacon v. Arizona*, 410 U.S. 351,

93 S.Ct. 998, 35 L.Ed.2d 346 (1973); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1962); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969); *Beck v. Washington*, 369 U.S. 541, 549-554, 82 S.Ct. 955, 960-962, 8 L.Ed.2d 98 (1962); *Ellis v. Dixon*, 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231 (1955); *Edelman v. People of California*, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387 (1953); *Bailey v. Anderson*, 326 U.S. 203, 66 S.Ct. 66, 90 L. Ed. 3 (1945); *State Farm Mutual Ins. Co. v. Duel*, 324 U.S. 154, 65 S.Ct. 573, 89 L.Ed. 812 (1945); *Herndon v. Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 23 S.Ct. 375, 47 L. Ed. 480 (1903).

The writ should be denied because this Court has no jurisdiction to decide the question presented by the Petition for Writ of Certiorari.

II

The Petition for Writ of Certiorari Presents No Federal Question of Substance. The Question Presented, as Formulated by the Petitioner, Is Based on an Erroneous Interpretation of the Opinion of the Missouri Court of Appeals, Below, and of Missouri Law. Respondent's Verdict Directing Instruction Properly Submitted the Ultimate Issues in This Case and Was Fully Consistent With the Federal Employers' Liability Act.

Petitioner's formulation of the question presented is clearly based upon a drastically erroneous interpretation of both the opinion of the Missouri Court of Appeals, below, and of Missouri law concerning Missouri Approved Instruction generally. Petitioner's contention that a federal question of substance and of general importance is presented by its Petition for Writ of Certiorari assumes and depends on this erroneous interpretation.

An accurate and proper interpretation of the opinion below and Missouri law makes it apparent that no federal question of substance or of general importance is presented by this record.

Petitioner's formulation of the Question Presented assumes that *Missouri Supreme Court Rule 70.02, V.A.M.R.*, "mandates the use of only one and the same designated jury instruction (M.A.I. 24.01), for all Federal Employers' Liability Act cases tried in the State Courts of Missouri." By that formulation of the issue Petitioner seeks to create the impression that the Missouri courts would inflexibly and arbitrarily compel the use of M.A.I. 24.01 in a Federal Employers' Liability Act case where it would be inapplicable and therefore inappropriate. Such is not the holding of the opinion of the Missouri Court of Appeals below, nor is it the law of the State of Missouri.

Missouri Supreme Court Rule 70.02 (b), V.A.M.R., provides:

> "(b) Missouri Approved Instructions Exclude Others. Whenever Missouri Approved Instructions contains an instruction *applicable in a particular case* which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject." (Emphasis supplied)

Missouri Supreme Court Rule 70.02 (e), V.A.M.R., provides:

> "(e) Guide for the Form of Instructions Where MAI Not Used. Where an MAI must be modified to fairly submit the issues in a particular case, or where there is no applicable MAI so that an instruction not in MAI must be given, then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts."

Missouri's procedural rules regarding Missouri Approved Instructions (and the form of instruction where no Missouri Approved Instruction is applicable) are supported by a legitimate, if not a compelling, state interest. That interest was set forth by the Missouri Supreme Court in *Brown v. St. Louis Public Service Co.*, 421 S.W.2d 255, 257 (Mo. banc 1967), as follows:

> "This court, by its adoption of Missouri Approved Instructions, promulgated precise approved instructions. These had been drafted after much research and great effort on the part of the court's special committee and its able reporter, the late Professor John S. Divilbiss. A preliminary draft was distributed and suggestions were received from the bench and bar before final adoption. *The system was devised to eliminate the old system of complex, detailed and frequently argumentative instructions which caused great difficulty for jurors, lawyers and judges, and resulted in a high percentage of reversals on account of instructions given or refused. The special committee carefully considered the precise words to use in each approved instruction in order to provide simple, concise and understandable instructions.* Directions as to the format to be followed were given to cover those instances where no MAI instruction is provided or where the facts of a case require modification of an MAI instruction. When an MAI instruction is applicable, its use is mandatory." (Emphasis supplied.)

It should be noted that Missouri Approved Instructions were adopted in 1965 and that M.A.I. 24.01, pertaining to Federal Employers' Liability Act cases, has been specifically used in cases to which it is applicable in the Missouri Courts since that time.

It is apparent that use of a Missouri Approved Instruction is required *only* if the instruction is applicable to the particular case. The rule clearly contemplates that cases will arise in which a Missouri Approved Instruction will not fairly submit the issues in a case. Missouri law does not senselessly require a Missouri Approved Instruction in such a case, as Petitioner would have

this Court to believe. Rather, the pattern instruction is to be modified to fairly submit the issues, or, if that is not possible, a new instruction is to be drafted to submit the case according to outlines set forth in the Rules.

Missouri Supreme Court Rule 70.02 (c), V.A.M.R., provides that giving an instruction in violation of the Rule is error and leaves the prejudicial effect of such error to be judicially determined. The Missouri Supreme Court has held that when there is a deviation from an applicable Missouri Approved Instruction which does not require modification to fairly submit the issues in a case, prejudicial error will be presumed unless the proponent of the instruction can clearly demonstrate that no prejudice resulted. *Brown v. St. Louis Public Service Co.*, 421 S.W.2d 255 (Mo.banc 1967).

The foregoing authorities were cited by the Missouri Court of Appeals in affirming the verdict and judgment for Respondent. It is irrational to conclude the Missouri Court of Appeals, while relying on *Missouri Supreme Court Rule 70.02 (then Rule 70.01)* and *Brown*, would simultaneously ignore the clear teachings of those authorities and hold that M.A.I. 24.01 must be given without regard to its applicability to a given case.

It is patently obvious that the Missouri Court of Appeals found M.A.I. 24.01, as set forth in Respondent's verdict directing instruction, to be applicable to this case and that the instruction fairly submitted the issues in the case to the jury.

Careful examination of the Petition for Writ of Certiorari suggests that Petitioner is attempting to create a false issue in this case by attacking a statement made in the opinion in an enirely different case, *Ricketts v. Kansas City Stock Yards Company of Maine*, 484 S.W.2d 216 (Mo. banc 1972).

Apart from the inappropriateness of seeking review of a statement in an entirely different case by review of the instant case,

Petitioner is seeking to raise an illusory issue by suggesting that the jury in the instant case was given an improper standard with which to determine the issue of negligence. In so doing, Petitioner has conveniently neglected to include in its Statement of the Case Instruction No. 3, which clearly instructed the jury on negligence in terms of ordinary care. Instruction 3 provided as follows (R.330):

> "The term 'negligence' as used in these instructions means the failure to use that degree of care that an ordinarily careful and prudent person would use under the same or similar circumstances."

Apart from the foregoing, it is a fundamental principle of review of state judgments in this Court that:

> "This Court reviews judgments, not statements in opinions. Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S.Ct. 459, 462-463, 89 L.Ed. 789; Morrison v. Watson, 154 U.S. 111, 115, 14 S.Ct. 995, 997, 38 L.Ed. 927. See also Williams v. Norris, 12 Wheat. 117, 118, 120, 6 L. Ed. 571."

Black v. Cutter Laboratories, 351 U.S. 292, 297-298, 76 S. Ct. 824, 827, 100 L.Ed. 1188 (1956).

The reason for the foregoing rule is set forth by this Court as follows:

> "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review could amount to nothing more than an advisory opinion."

Herb v. Pitcairn, 324 U.S. 117, 125-126. 65 S.Ct. 459, 463. 89 L.Ed. 789 (1945).

The insubstantial nature of Petitioner's contentions is further illustrated by the fact that Petitioner's counsel virtually admitted liability in his closing argument.

> "Ladies and gentlemen, Mr. Griffith's case is not worth $150,000. As you can see, the main issue here between the railroad and Mr. Griffith is amount. That's what this fight in large measure is about." (R. 358)

Instruction No. 2, Respondent's verdict directing instruction, which followed M.A.I. 24.01 and was submitted by the Court, provided as follows (R. 330):

> "Your verdict must be for the plaintiff if you believe:
>
> First, defendant failed to provide reasonably safe conditions for work, and
>
> Second, defendant was thereby negligent, and
>
> Third, such negligence directly resulted in whole or in part in injury to plaintiff."

Under the provisions of the Federal Employers' Liability Act, Petitioner was obligated to fulfill its nondelegable duty to provide plaintiff with a safe place to work, stripped of its common-law defenses and liable if its negligence played any part, however slight, in producing Respondent's injuries. This has come to be known as the Safe-Place-To-Work Doctrine. *45 U.S.C. §51; Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 507-509, 77 S.Ct. 443, 448-450, 1 L.Ed.2d 493, 500 (1957); *Shenker v. Baltimore and Ohio Railroad Company*, 374 U.S. 1, 7, 83 S.Ct. 1667, 1671-1672, 10 L.Ed.2d 709, 714-715 (1963). The overwhelming evidence *admitted at the trial without objection* clearly and unequivocally supported the submission of M.A.I. No. 24.01, Petitioner's failure to provide reasonably safe conditions for work. That evidence can be summarized as follows: Numerous complaints had been made prior to Respondent's injuries about the assembly rack

and the working conditions involved in the assembling of rebuilt air brake pistons (R.21,25,35,37,38,40,51,57,72,74,126, 139,140,304,305,314). There were two such racks in Petitioner's shops prior to this occurrence. One was equipped with a sturdy device, to hold the piston head, and a positive safety device, to insure proper insertion and to prevent the head from flying out during assembly (R.68-71,301,302). The rack which Respondent was working with at the time of his injuries was not equipped with either (R.21-26,30,43,44,57,68-71,131,132). In addition to the deficiencies involving the rack itself, there were other conditions existing in the work area and in the work assignment which were unsafe and which contributed to cause Respondent's injuries. The parts to be assembled by hand were soaked in oil and rust prohibitor. During the assembling oil would squirt all over and run down the machine (R.88). Oil and grease would run all over everything (R.25,40,52,73,74,88,133,134). Petitioner's superintendent admitted that it was messy (R.305,352,353). The oil and grease would have a tendency to cause the piston heads to slip out (R.25,40,52,73,74,305). In addition, Respondent was required to work alone at the assembly rack (R.40). Petitioner's quota system required Respondent to assemble, alone and by hand, one piston approximtely every ten minutes (R.124, 125). He was not provided with goggles or safety glasses (R. 25,26,140,141), and was required to leave the partially assembled piston on the rack under pressure and unattended during the assembly process (R.24,38,40,88). Eighty pounds of continuous air pressure would compress the piston upward 18 to 20 inches, causing the retainer lugs to bend upward (R. 85-88,94,129,135,146). The combination of the above unsafe conditions, oily, slippery and greasy parts, unattended machine with eighty pounds of continuous upward pressure, one man working alone (another man could have held the piston), no positive safety device, no sturdy retainer device and no safety glasses or goggles all contributed to cause Respondent's injuries. *Respondent specifically testified that it was everything*

combined that caused the piston head to come out and strike him (R.94).

The foregoing evidence clearly and unequivocally supported the submission of Petitioner's failure to provide reasonably safe conditions for work (M.A.I. 24.01). All of the foregoing evidence was admitted at trial without objection. Plaintiff's petition was deemed, as a matter of state law, to be amended to conform to the evidence introduced, in that such issues raised by the evidence were tried with the consent of the parties. *Missouri Supreme Court Rule 55.33 (b), V.A.M.R.; Middleman v. Complete Auto Transit, Inc.*, 486 S.W.2d 456, 462 (Mo. banc 1972).

Missouri rules concerning the form of approved instructions are procedural in nature. *Meredith v. Missouri Pacific Railroad Co.*, 467 S.W.2d 79, 82 (Mo. 1971). When, as here, an instruction in a Federal Employers' Liability Act case correctly states the substantive law and is clearly supported by the evidence, the *form* of the instruction is a matter left to state procedural law. When a federal cause of action, such as one under the Federal Employers' Liability Act, is prosecuted in state court, the proceeding is conducted according to the state rules of procedure, *Brown v. Gerdes*, 321 U.S. 178, 189-190, 64 S.Ct. 487, 492-493, 88 L.Ed. 659 (1944) (concurring opinion), unless the state procedural rule is in direct conflict with a substantive aspect of the federal cause of action. *See, e.g., Dice v. Akron C. & Y. RR.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952); *Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961 (1916); *Central Vermont Ry. v. White*, 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed. 1433 (1915). As demonstrated above, Respondent's verdict directing instruction correctly states the federal substantive law. Petitioner cannot in good faith contend that it was in any way prejudiced by the utilization of Instruction No. 2 in this case.

CONCLUSION

Petitioner, by its efforts to create an illusory issue, by its erroneous interpretation of the opinion of the Missouri Court of Appeals and Missouri law and by its disregard of the record in this case, seeks to portray the question presented by its Petition for Writ of Certiorari as a substantial federal question of general importance. However, based upon the foregoing considerations, it is apparent that there is no merit to the issues raised by Petitioner and that the writ should be denied for want of a properly preserved substantial federal question. *U.S. Supreme Court Rule 19.1 (a).*

Respectfully submitted,

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